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Supreme Court of the United States

OCTOBER TERM 1956

NO. 892

RAYMOND MOUSHON, *Plaintiff-appellant,*	)	
vs.	)	Appeal From The Supreme Court of Illinois
NATIONAL GARAGES, INC., *Defendant-appellee.*	)	

JURISDICTIONAL STATEMENT

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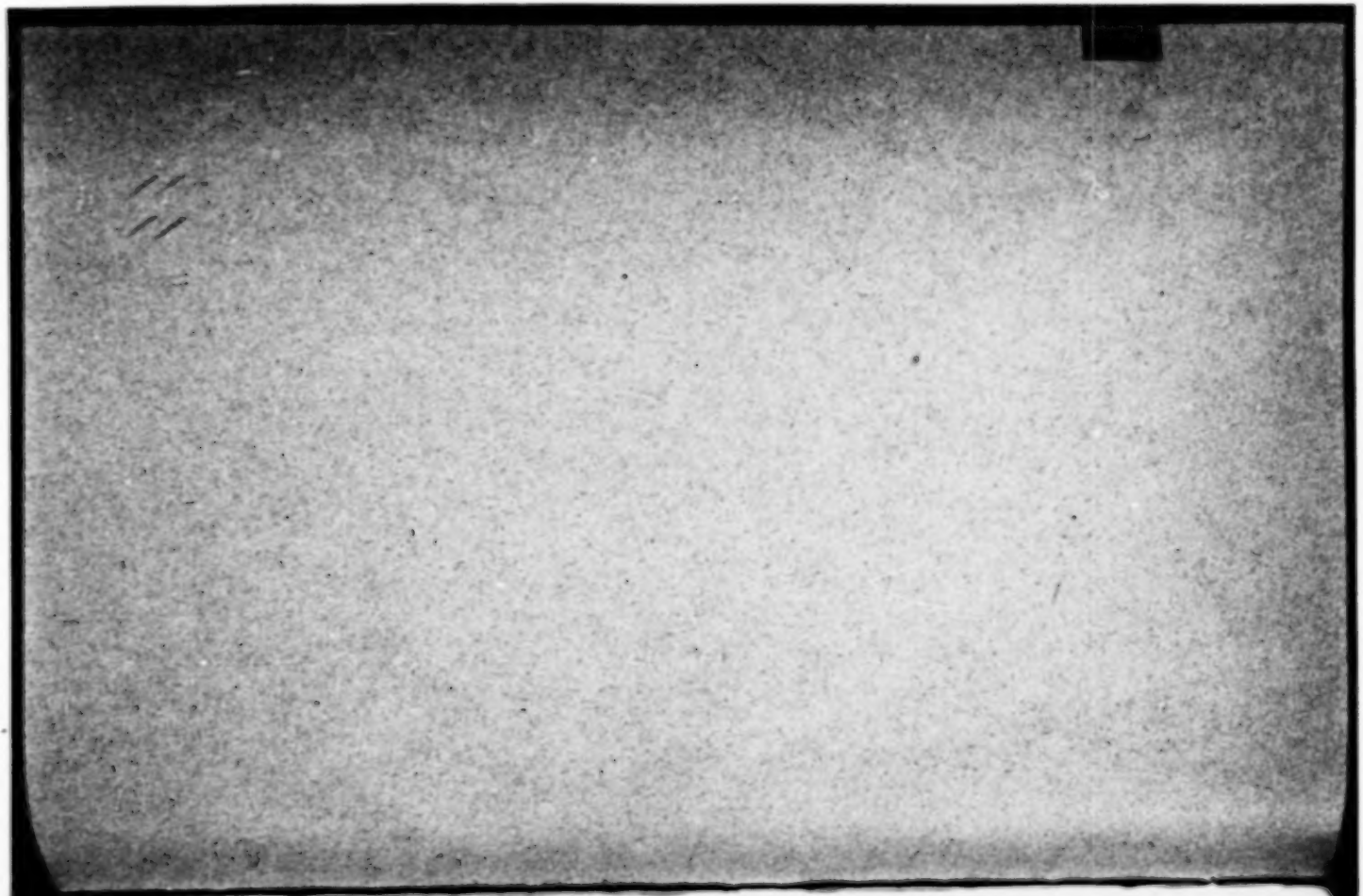

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SUPREME COURT OF THE UNITED STAES

OCTOBER TERM 1956

NO.————————

RAYMOND MOUSHON,)
Plaintiff-Appellant,)
vs.)
NATIONAL GARAGES, INC.,)
Defendant-Appellee.)

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

JURISDICTIONAL STATEMENT

I

This case is reported in 9 Ill. 2d 407 (advance sheet dated December 5, 1956, Illinois Official Reporter) and in 137 NE 2d 842 (Advance Sheet North Eastern Reporter Second Series dated December 5, 1956). The first opinion on which a petition for rehearing was granted was not reported but a copy is appended hereto.

II.

STATEMENT OF GROUNDS ON WHICH JURISDIICTION OF SUPREME COURT OF UNITED STATES IS INVOKED.

This court has jurisdiction on appeal because the Supreme Court of Illinois ruled that Section 5(a) of the Illinois Workmen's Compensation Act (Illinois Revised

Statutes 1951 Ch. 48 Par. 138.5) when applied to the facts in this case did not violate Section 1 of the Fourteenth Amendment to the Constitution of the United States.

NATURE OF THE PROCEEDINGS

Plaintiff filed a suit at common law to recover damages for an injury caused by the negligence of his employer, the defendant. The defendant filed a motion to dismiss the suit on the ground that the plaintiff's exclusive remedy was under the Workmen's Compensation Act and that Section 5(a) of that act prohibits an employee from filing an action at common law. Plaintiff filed a motion to strike the Defendant's motion on the ground that if Section 5(a) was a bar to Plaintiff's common law action then the act when applied to the facts in this case violated Section 1 of the Fourteenth Amendment to the United States Constitution. The trial court denied plaintiff's motion, allowed the defendant's motion and dismissed the suit.

The Supreme Court of Illinois on September 26, 1956, entered an order affirming the trial court's order dismissing the suit and on November 19, 1956, entered an order denying Plaintiff's Petition for a Rehearing. Notice of appeal was filed in the Supreme Court of Illinois on February 13, 1957.

STATUTORY PROVISION CONFERRING JURISDICTION ON THIS COURT

The Supreme Court of the United States has jurisdiction pursuant to the provisions of 28 USCA Sec. 1257 (2) which reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be

had, may be reviewed by the Supreme Court as follows:

By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

CASES BELIEVED TO SUSTAIN THE JURISDICTION OF THIS COURT ARE:

Illinois Ex Rel. McCullom v. Board of Education 333U.S. 203, 92 L. Ed 649, 68 S Ct. 461, 2ALR2d 1338

Charleston Federal Savings & Loan Association v. Alderson 324 U.S. 182, 89 L.Ed. 857, 65 S Ct. 624

Central Greyhound Lines v. Mealey 334 U.S. 653, 92 L.Ed. 1633, 68 S Ct. 1260

New York Central Railroad Co. v. White 243 U.S. 188, 37 S Ct. 247, 61 L. Ed. 667

Norris v. Alabama 294 U.S. 587, 79 L. Ed. 1074, 55 S. Ct. 579

Johnson Oil Ref. Co. v. Oklahoma 290 U.S. 158, 78 L. Ed. 238, 54 S. Ct. 152

Brown v. Western Railway of Alabama 338 U.S. 294, 94 L. Ed. 100, 70 S. Ct. 105

First National Bank v. Anderson 269 U.S. 341, 70 L. Ed. 295, 46 S. Ct. 135

The case involves the constitutionality of Sec. 5a of the Illinois Workmen's Compensation Act (Illinois Revised

Statutes 1951 Ch. 48 par. 138.5) as it applies to the facts in this case. That section reads as follows:

> "No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury."

III.

QUESTION PRESENTED BY THIS APPEAL

The question presented by this appeal is whether a Workmen's Compensation Act is constitutional which takes away an employee's common law right to sue his employer for negligence resulting in permanent bodily injury where the statute in question makes no provision for compensation for the permanent effects of the injury sustained. The Supreme Court of Illinois held that plaintiff could not recover for the permanent effects of his injury under the terms of the Compensation Act and that he did not have the right to sue at common law because the Compensation Act prevents the filing of a common law suit.

The Illinois court held the employee's right to compensation benefits based on the permanent effects of his injury depended on the classification of injuries set out in the statute and also held that the classification was reasonable and did not violate the 14th Amendment. The classification can be summarized as follows:

(1) Where the injury constitutes loss of a bodily member, disfigurement or partial or total disability (to pursue his usual employment) then the permanent effect of the injury is a factor in determining the amount of compensation, but

(2) Where the injury does not involve loss of a member, disfigurement or partial or total disability the permanent effect of the injury is not a factor in determining the amount of compensation even though the injury may be a serious one caused by the employer's negligence.

The question therefore is whether this classification is arbitrary and unreasonable when applied to the facts in this case to the extent that it deprives the plantiff of his rights under the "due process" and "equal protection" clauses of the Fourteenth Amendment. Plaintiff-appellant does not contend that this classification ipso facto renders the entire act unconstitutional but he does contend that when it is applied to the facts in this particular case it deprives him of his rights under the 14th Amendment.

IV.

STATEMENT OF FACTS

RAYMOND MOUSHON, Plaintiff-appellant, was employed by NATIONAL GARAGES, INC., Defendant- appellee. Plaintiff's complaint alleges that he was injured while in the course of his employment when a safety device on the "man-lift" on which he was riding failed to operate. The complaint alleges three specific acts of negligence on the part of the employer and alleges his injuries were the proximate result of his employer's negligence. Plaintiff describes his injuries in his complaint as a ruptured urethra and crushed and bruised internal organs, which injuries have not permanently disabled him

from engaging in his usual type of work but have rendered him impotent and have caused him great pain and suffering. The defendant filed a motion to dismiss the complaint on the ground that Sec. 5(a) of the Workmen's Compensation Act barred the plaintiff from bringing a common law suit. Plaintiff then filed a motion to strike the defendant's motion to dismiss on the following grounds:

(1) The Workmen's Compensation Act does not provide compensation for the type of injury plaintiff sustained.

(2) It was not the intention of the Illinois Legislature that the Act should be a bar to the employee's common law suit where the injury was of a type that no compensation was provided for it by the Act. Plaintiff in his motion pointed out that the compensation act in Illinois provided compensation where the injury was of a nature which disabled the employee wholly or partially from earning a livelihood but provided no compensation for the permanent effects of an injury which did not impair the employee's ability to work; that such a classification was arbitrary and unreasonable and that the employee's remedy to recover for injuries suffered as a result of his employer's negligence depended on a fortuitous circumstance, namely the nature of the injury sustained.

(3) If th Act is construed to be a bar to the plaintiff's suit then the act when applied to the facts in this case violates the Illinois Constitution and the Fourteenth Amendment to the United States Constitution.

The trial court denied the plaintiff's motion and allowed the defendant's motion and dismissed the suit. (Abstract page 10).

The Illinois Supreme Court in its first opinion handed down January 19, 1956, reversed the trial court and unan-

imously held that the legislature never intended the act to be a bar to the employee's common law suit where his injuries were such that they were not compensable under the act and that to hold otherwise would make the act unconstitutional under both the Illinois Constitution and the Fourteenth Amendment to the United States Constitution. A petition for Rehearing was allowed, however, and on rehearing the court in a second opinion affirmed the ruling of the trial court and held the act was not unconstitutional in barring plaintiff's common law action. There was a dissenting opinion written.

The question of whether Sec. 5(a) of the Illinois Workmen's Compensation Act violated the 14th Amendment to the United States Constitution was raised in the trial court by the Plaintiff's motion to strike the defendant's motion to dismiss the case and passed on by the trial court when that motion was denied (Abstract pages 7 & 10). The same question was presented to the Illinois Supreme Court and was covered by the initial briefs of the parties and argued on oral hearing. The question was subsequently raised by the plaintiff's answer to the petition for rehearing, was passed on by the Supreme Court of Illinois in both opinions and argued by the plaintiff in his petition for rehearing filed after the second opinion was handed down.

V.

THE FEDERAL QUESTION INVOLVED IS SUBSTANTIAL

The Illinois Workmen's Compensation Act provides that claims by employees whose injuries arise out of and in the course of their employment are to be litigated before an Industrial Commission which is an Administrative

Board appointed by the governor. The jurisdiction of the Commission is limited by the terms of the Act. It does not have common law or equitable jurisdiction. Its authority to make an award to an injured employee is limited by the act. Peru Plow and Wheel Co. v. Industrial Commission 311 Ill. 216, 142 NE 546. Section 8(d) of the Act (Ch. 48 Sec. 172.43(d) Ill. Rev. Stat. 1951) authorizes the Commission to make awards where the employee "becomes partially incapacitated from persuing his usual and customary line of employment" Sec. 8(f) Ch. 48 sec. 172.43(f) Ill. Rev. Stat. 1951) for complete disability, "which renders the employee wholly and permanently incapable of work"; Sec. 8(c) for disfigurement to the hand, head, face or neck and Sec. 8(e) (Ch. 48 sec. 172.43(e) Ill. Rev. Stat. 1951) for enumerated specific loss or loss of use of bodily members. The plaintiff's injury, although of a serious nature, does not fit into any of the foregoing categories and for this reason the Act does not provide him with a remedy whereby he can recover for the permanent effect of the injury caused by his employer's negligence.

The defendant contends and the Illinois Supreme Court held:

The Compensation Act is a legitimate exercise of the State's police power; that it represents a compromise of the employer and the employees rights and that in exchange for a certain recovery of a limited amount for certain types of injuries the employee was deprived of his right to recover for the permanent effects of other types of injuries.

The plaintiff contends that the classification established by the act is arbitrary; denies him the equal protection of the law and deprives him of his property right without due process; that the classification which denies this plain-

tiff the right to recover for the type of injury he has received as a result of his employer's negligence in order that other employees can recover for injuries of another type even though they may have been caused by their own negligence is an arbitrary classification and has no rational relation to the evil which the statute was designed to correct. The plaintiff contends that under this classification the right of an employee to recover for injuries caused by his employer's negligence depends on a fortuitous circumstance, namely the type of the injury which he happens to sustain. A statute which deprives one employee of his right to sue for injuries caused by his employer's negligence in order to make it possible for another employee to recover for an injury without being required to prove the employer was negligent denies the former the equal protection of the laws.

The precedent which is involved affects injuries other than those which plaintiff in this case received such as injuries resulting in loss of speech; serious scars and disfigurement to portions of the body other than the hands, head, face and neck; disease such as diabetes caused by trauma; miscarriages; injuries which make it impossible for women employees to bear children; back injuries where there is no fracture of a vertebrae and others.

This court has passed on questions involving the constitutionality of state Workmen's Compensation Acts but has never passed on the constitutional question raised by the facts in this case.

In the leading case of New York Central Railroad Co. v. White 243 US 188, 37 Sec. 247, 61 L. Ed. 667 the employer raised the question of the constitutionality of the New York Act under the 14th Amendment. The New York Act contained a clause providing that the act was the employee's

exclusive remedy similar to Sec. 5(a) of the present Illinois Act.* The court assumed however that the act would not be applicable except in those cases where it provided compensation to the injured employee and stated at L. Ed. 675:

> "Of course, we cannot ignore the question whether the new arrangement is arbitrary and unreasonable, from the standpoint of natural justice. Respecting this, it is important to be observed that the act applies only to disabling (203) or fatal personal injuries received in the course of hazardous employment in gainful occupation."

This court in the White case was careful to point out that it was not deciding the question of whether a state could deprive an employee of his common law action by enacting a Compensation Act without providing some reasonable substitute and said at L. Ed. 674:

> "Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of 'due process of law', suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute."
>
> " . . . it perhaps may be doubted whether the state could abolish all rights of action, on one hand, or all defenses, on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it."

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*See this section of the New York Act quoted at 61 L.E. 671

The court reserved the right to pass on the question of whether the compensation provided by a compensation act was unreasonable in amount, "either in general or in the particular case" and said at L. Ed. 676:

> "This, of course, is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other,would be supportable. In this case, no criticism is made on the ground that the compensation prescribed (206) by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises."

In the same term of court as the White case this court passed on the constitutionality of the Washington Compensation Act in the case of Mountain Timber Co. v. Washington 243 US. 219, 37 S. Ct. 260, 61 L. Ed. 685 and at L. Ed. 697 reiterated the following language from the White case.

> "With respect to the scale of compensation, we repeat what we have said in New York C. R. Co. v. White, that, in sustaining the law, we do not intend to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable, and that any question of that kind may be met when it arises."

Also decided at the same term of court was the case of Hawkins v. Bleakly 243 US 210, 37 S. Ct. 255, 61 L. Ed. 678 wherein the Iowa Compensation Act was held constitutional. The court in holding the classifications set up by the act were not arbitrary pointed out that all employees were treated alike and so were all employers.

Other cases decided by this court involving the constitutionality of State Workmen's Compensation Acts are Middletown v. Texas Power and Ligt Co. 249 US 150, 63 L. Ed. 527, 39 S. Ct. 227 and Industrial Com. v. McCartin 330 U.S. 622, 67 Sec. S. Ct. 886, 91 L. Ed. 1140 but in these cases the question involved was not the same as in the case at bar, namely, where the injury is of a certain type and is the result of the employer's negligence, is it consistent with the 14th amendment, to grant the employer immunity and deprive the injured employee of his remedy merely because the employer has assumed an obligation to pay compensation, not to this injured person, but to some other person who has sustained an injury of another type.

DECISION OF FEDERAL QUESTION WAS NECESSARY TO DETERMINATION BY STATE COURT.

The Illinois Court in referring to the issues in the case stated,

"The issue is two-fold: (1) Does section 5(a) of the Workmen's Compensation Act bar the plaintiff's suit? (2) If so, is the statute as so construed constitutionally valid?" (Record p. 18)

The first issue namely, "Does the act bar the plaintiff's common law suit?" was raised when the defendant filed its motion to dismiss which was based solely on Sec. 5(a) of the Act.*

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*Defendant in its motion refers to Sec. 6 of the 1949 act instead of Sec. 5(a) of the 1951 act however this is not important because the language is the same in both sections and the amendment affected only the numbering of this paragraph.

We call the court's attention to the fact that the defendant did not contend in his motion that plaintiff's injury was compensable under the act but relied solely on Sec. 5(a). The trial court allowed this motion and the Illinois Supreme Court affirmed the ruling of the trial court thus holding that the Act was a bar to the plaintiff's common law suit.

The second issue, namely, "Does the Statute in barring plaintiff's suit violate the Illinois Constitution and the Fourteenth Amendment to the United States Constitution?" was raised by the plaintiff's motion to strike the defendant's motion to dismiss. Paragraph 4 of this motion (Abstract p.7) indicates that plaintiff based his contention on the 14th amendment as well as on sections of the Illinois Constitution.

When the trial court denied this motion and dismissed the case it ruled on the constitutional question. When the Illinois Supreme Court affirmed the trial court's order it of necessity passed on the constitutional question.

THE DECISION OF THE ILLINOIS COURT DOES NOT REST ON ADEQUATE STATE GROUNDS.

The only possible state ground on which the decision could be based without passing on the constitutional question is that the statute provides compensation for the permanent effect of the injuries plaintiff has described in this Complaint.

A cursory reading of the final opinion of the Illinois Supreme Court might lead one to believe that the Illinois Court held as a matter of law and medical fact that the plaintiff's injuries amounted to loss of use of testicles for which plaintiff had a remedy under the act and that it

was, therefore, unnecessary to pass on the constitutional question.

The court discussed the possibility of a recovery for loss of use of testicles under the Compensation Act but it did not rule as a matter of law that plaintiff's injuries as described in his complaint were tantamount to loss of use of testicles. The court merely said "Actually it is difficult to see that any defense could exist to a claim for compensation under section 8(e) as well." (Record p. 19). In its discussion of syllabus 2 the court indicated that it was not holding that plaintiff's injuries as described in his complaint were tantamount to loss of use of testicles and said,

"Yet even if it be assumed that the injury is not under Section 8(e), it does not follow that plaintiff should prevail. He still is covered by the act and sustained an accidental injury for which he received compensation benefits. Threfore, by its clear import section 5(a) bars his suit."

This language by the court indicates that since plaintiff is "covered by the act" and has received benefits in the form of medical care and temporary disability bnefits he is barred by sec. 5(a) from bringing a common law suit to recover for the permanent effects of his injuries. This ruling of necessity required the court to hold that Sec. 5(a) was constitutional. The court expressly so ruled in its discussion of syllabus 4.

Even if we assume that the Illinois court did rule as a matter of law that plaintiff's injuries as described in his complaint are synonymous with the term "loss of use of testicles" this court should review the ruling of the Illinois court for the purpose of determining whether there is justification in the record for that ruling.

THIS COURT IS NOT PRECLUDED BY THE FINDINGS OF FACT OF A STATE COURT FROM EXAMINING THE RECORD FOR THE PURPOSE OF REVIEWING THE FINDINGS OF THE STATE COURT WHERE THIS COURT'S JURISDICTION DEPENDS ON THE FINDINGS OF FACT IN QUESTION.

In Norris v. Alabama 294 U.S. 587, 79 L. Ed. 1074, 55 S. Ct. 579 the question was whether the jury system in Alabama was such that it excluded negroes from jury lists. The state court had held that the evidence did not establish such exclusion. This court reviewed the evidence and held to the contrary.

In Johnson Oil Ref. Co. v. Oklahoma 290 U.S. 158, 78 L. Ed. 238, 54 S. Ct. 152 the court said:

"As the asserted Federal right turns upon the determination of the question of situs, it is our province to analyze the facts in order to apply the law, and thus to ascertain whether the conclusion of the state court has adequate support in the evidence."

See also Brown v. Western Railway of Alabama 338 U.S. 294; 94 L. Ed. 100 where this court held that it was not bound by the state court's construction of the plaintiff's complaint where the question of jurisdiction depended on that construction. This court said at 94 L. Ed. 102:

> "A long series of cases previously decided, from which we see no reason to depart, makes it our duty to construe the allegations of this complaint ourselves in order to determine whether petitioner has been denied a right of trial granted him by Congress. This federal right cannot be defeated by the forms of local practice. See American R. Exp. Co. v. Levee, 263 U.S. 19, 21, 68 L. Ed. 140, 143, 44 S. Ct. 11. And we cannot accept as

final a state court's interpretation of allegations in a complaint asserting it. First Nat. Bank v. Anderson, 269 U.S. 341, 346, 70 L. Ed. 295, 302, 46 S. Ct. 135; Davis v. Wechsler, 263 U.S. 22, 24, 68 L. Ed. 143, 145, 44 S. Ct. 13; Covington & L. Turnpike Road Co. v. Sandford, 164 U.S. 578, 595, 596, 41 L. Ed. 560, 566, 17 S. Ct. 198."

Plaintiff's injuries are described in his Amended Complaint as follows:

"13. That by reason of and in consequence of the negligence of the Defendant as aforesaid and as a direct and proximate result of said negligence, the plaintiff was thereby greatly injured in that his internal organs were greatly crushed and bruised including a ruptured urethra which injuries have not permanently disabled the Plaintiff from engaging in his usual type of work but have rendered him impotent and have caused him great pain and suffering and will in the future render him impotent for the remainder of his life." (Abstract p. 3)

Appellant is aware that this is not the time for a dissertation on the medical and anatomical aspects of the case however in order to adequately present this aspect of the case we cite definitions of the word "urethra" and "testicle".

"Urethra, a membranous canal which carries off the urine from the bladder, and in the male it also conveys the seminal fluid. The male urethra extends from the neck of the bladder to the urinary meatus (the opening in the end of the penis.)

The Simplified Medical Dictionary for Lawyers by Bernard S. Maloy, M.D. p. 438.

"Testicle, the male gonad; an egg-shaped organ or gland situated in the scrotum which produces spermatozoa."

The Simplified Medical Dictionary for Lawyers by Bernard S. Maloy, M.D. p. 427.

It seems apparent from a comparison of these two definitions that the terms are not synonymous to the extent that a court should take judicial notice that they are one and the same.* The only basis upon which such a finding

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*The court in discussing this aspect of the case in its first opinion said:

"Defendant, however, argues that plaintiff's injury comes under the category specified in section 8(e) (15), which refers to the loss of testicles. Defendant reasons that since impotency may be an incident of the loss of testicles, therefore, where impotency is produced from other causes, it must also be construed as a loss of testicles.

This rationale is without logic and cannot be accepted, since it is patent that the injury sustained by plaintiff was not the loss of testicles, but a ruptured urethra and involved a different part of the body with different anatomical consequences; and there is no allegation or proof that the injury to the urethra necessarily involves the loss or loss of use of testicles. The omission in section 8(e) of the act of an injury of the nature sustained by plaintiff cannot be supplied by resort to medical fiction, and, therefore, plaintiff's injury may not properly be deemed to be covered by the Workmen's Compensation Act."

(Record page 7)

could be made is that of medical evidence and since this case was decided on the pleadings there was no such evidence before the court.

In its discussion of this subject the Illinois court refers to certain "admitted facts" and states "The injury is admittedly compensable." The defendant in its brief mentioned that it had paid the plaintiff's medical and hospital bill and had paid plaintiff certain sums for temporary disability while he was in the hospital and plaintiff in his reply brief acknowledge that these payments had been made. These payments were voluntarily made by the defendant however and were not made pursuant to the ruling of the Industrial Commission or any court. Plaintiff submits that the payment of these sums by the defendant while plaintiff was in the hospital cannot be construed as an admission *by the plaintiff* that he does not have the injuries he claims but instead has suffered from another type of injury, namely loss of use of testicles.

Defendant in its brief also referred to the claim which plaintiff had filed with the Industrial Commission which is based on loss of use of testicles. Plaintiff acknowledged the filing of this claim in his reply brief and explained that it was filed as a precautionary measure because the time of filing such a claim was about to expire and it was not certain as to whether plaintiff's common law action would be allowed. The filing of this claim however does not establish that plaintiff's injuries are "admittedly compensable" under the act. The record does not indicate any such admission by the defendant and there is nothing in the court's decision which would prevent the defendant from introducing medical evidence to show plaintiff's claim is of a non-compensable type. It is submitted that all reference to these so called admissions are to matters outside

the record and are of no help in deciding the issue before the court.

Although the Illinois Court in its second opinion discussed the possibility that plaintiff may have a remedy under the act it does not so hold and in that portion of the opinion dealing with syllabus 2 it specifically holds that if plaintiff does not have a remedy for the permanent effects of his injury under the statute the statute nevertheless bars his right to recover at common law.

The opinion states that the court is being called upon to permit a recovery under the Workmen's Compensation Act and then permit also a suit at common law against the same person to recover additional damages. There is nothing in the record to indicate that plaintiff seeks a double recovery and it is difficult to see how such an issue could be raised from the record in this case. The issue before the court is not whether plaintiff is entitled to a double recovery but instead whether he has any remedy at all. The effect of the decision is to limit the plaintiff's remedy to that of obtaining medical proof to establish that his "crushed and bruised internal organs including a ruptured urethra" are one and the same as loss of use of testicles.

The ruling of the Illinois court can be summarized as follows:

If the plaintiff can prove by medical evidence that the injuries described in the complaint are tantamount to loss of use of testicles then he has a remedy under the Workmen's Compensation Act for the permanent effects of his injury. If he cannot prove this he has no remedy because Sec. 5(a) takes away his right to file a common law suit and Sec. 5(a) is not unconstitutional as applied to the facts in this case.

Plaintiff-Appellant submits that the record in this case, which consists of the pleadings filed by the parties, is such that it would be impossible for the Illinois Supreme Court to formulate the foregoing rule and affirm the ruling of the trial court without holding that Sec. 5(a) of the act did not violate the 14th Amendment of the United States Constitution when applied to the facts in this case.

The Illinois court has in fact held that a state statute which denies a remedy to one class of employees who have been wronged in order to benefit another class of employees who have not been wronged does not violate the due process and equal protection clauses of the 14th Amendment. This is a mass-production system of justice for which there appears to be no constitutional, social or economic justification and we respectfully submit that such an innovation should not become the law of the land until it has been passed on by this court.

Plaintiff-Appellant respectfully prays that this court entertain jurisdiction of this appeal under Section 1257(2) of the Judicial Code.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCOBER TERM 1956

No. ————————

RAYMOND MOUSHON, *Plaintiff-appellant,*	)	
	)	Appeal from
-vs-	)	Supreme Court
	)	of Illinois
NATIONAL GARAGES, INC. *Defendant-appellee.*	)	

APPENDIX TO JURISDICTIONAL STATEMENT

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FIRST OPINION OF ILLINOIS SUPREME COURT

Docket No. 33536—Agenda 19—March, 1955

Raymond Moushon, Appellant, v. National Garages, Inc., Appellee.

MR. JUSTICE BRISTOW delivered the opinion of the court:

Plaintiff, Raymond Moushon, instituted proceedings for common-law damages for personal injuries resulting in impotency, sustained in an accident while in the course of his employment for defendant, National Garages, Inc., and allegedly caused by defendant's negligence. The circuit court of Peoria County allowed defendant's motion to dismiss the cause on the ground that section 5(a) of the Workmen's Compensation Act barred the action, and denied plaintiff's motion contesting the constitutionality of that section. From the judgment for defendant on the pleadings, plaintiff has appealed directly to this court on the theory that a constitutional question is involved.

The cause presents essentially the issue of whether section 5(a) of the Workmen's Compensation Act (Ill. Rev. Stat. 1951, chap. 48, par. 138.5,) may be deemed constitutional if it is construed to bar an employee's right to common-law damages from a negligent employer for nondisabling injuries of the nature sustained herein.

According to the facts appearing from the pleadings, defendant maintained in its parking garage a "man lift" used to transport employees from the basement to the upper floors to get customer's automobiles which were then driven down ramps to the main floor. The device consisted of steps attached to a moving belt which operated in a

vertical position over drums, and extended from the basement of the premises to the third floor, through openings in each floor. The employees stood on these steps and rode to the upper floors. The top drum over which the belt and steps travelled was approximately 9 inches below the third floor ceiling, and a safety device, whereby the belt was stopped by the weight of the passenger's body when he passed the third floor, was supposed to prevent him from being carried to the ceiling.

According to plaintiff's allegations, on October 11, 1952, while plaintiff was riding the "man lift" in the course of his employment for defendant, the safety device failed to operate, and plaintiff had to jump to avoid being [illegible] crushed against the ceiling of the third floor. As he did so his legs straddled the top guard rail causing injury to his internal organs, including a ruptured urethra and ensuing impotency, which injuries have not permanently disabled him from engaging in his regular work, but have caused him great pain and suffering. Plaintiff received some payment of medical expenses and temporary disability from his employer and instituted this proceeding for damages only for the permanent effects of his injury

Defendant moved to dismiss the complaint on the ground that section 5(a) of the Workmen's Compensation Act barred all common-law actions for damages by an employee against his employer where both are operating under the act, and that plaintiff's remedy, if any, would be under that act. Plaintiff thereupon moved to strike that motion on the ground that if section 5(a) were held to bar a common-law claim of this nature it would violate sections 2 and 19 of article II, and section 22 of article IV of the Illinois constitution, and the fourteenth amendment to the constitution of the United States. As hereinbefore noted,

the circuit court denied plaintiff's motion, but sustained defendant's motion and dismissed the complaint.

This court has jurisdiction of this direct appeal, for the only ground for dismissing the cause of the pleading was that the action was barred by section 5(a) of the Workmen's Compensation Act, and plaintiff specifically challenged the constitutionality of that section by his motion to strike, which the court denied.

As defendant contends, the constitutionality of the Workmen's Compensation Act has been sustained in numerous cases (Grand Trunk Western Railway Co. v. Industrial Com. 291 Ill. 167; Deibeikis v. Link-Belt Co. 261 Ill. 454; Dietz v. Big Buddy Coal and Iron Co. 263 Ill. 480; People ex rel, Radium Dial Co. v. Ryan, 371 Ill. 597,) however, it is established that a decision sustaining the constitutionality of a statute is not decisive of its validity against subsequent attack upon different grounds, and does not preclude the court from declaring the statute, or section thereof, unconstitutional where it is assailed upon other grounds. (Grasse v. Dealer's Transport Co. 412 Ill. 179, 184; Parks v. Libby-Owens-Ford Glass Co. 360 Ill. 130.) In the instant case plaintiff argues that if section 5(a) of the Workmen's Compensation Act is deemed to bar actions for injuries of the nature sustained by plaintiff, that provision of the act offends the due process clauses of the State and Federal constitutions (Ill. Const. art. II, sec. 2; Const. of U.S. 14th amend.), the provision of the State constitution that every person ought to find a certain remedy in the law for all injuries and wrongs which he may receive in his person, property or reputation (Ill. Const. art. II, Sec. 19,) and the section prohibiting the General Assembly from passing special laws granting any corporation or individual any special or exclusive privilege, immunity or franchise. Ill. Const. art. IV, sec. 22.

In determining whether section 5(a) of the act offends these various provisions of the State and Federal constitutions, as plaintiff contends, it is incumbent upon this court to ascertain the meaning and purport of the section, construed in the light of the entire Workmen's Compensation Act. (Dietz v. Big Muddy Coal and Iron Co. 263 Ill. 480, 487.) In the Dietz case the court stated: "Once the subject matter is clearly ascertained and the general legislative purpose discovered, a key is thereby furnished which will enable one to corectly interpret all of the constituent and subordinate elements found in the act."

As reiterated in the case law, the Workmen's Compensation Act was designed so that industry rather than society should care for its wrecked manpower, and that care, "whether it be in the form of a specific allowance for specified injuries, or whether it be based on reduced earning power, is to remunerate the injured party for his financial loss through the reduction of his industrial value." Lambert v. Industrial Com. 411 Ill. 593, 606; Petrazelli v. Propper, 409 Ill. 365.

Compensation awards are provided under the act for partial incapacity (section 8(d); permanent total disability (section 8(f); and for enumerated specific loss or loss of use of bodily members (section 8(e)). Partial incapacity and permanent total disability awards are predicated upon the employee's ability to pursue his usual or suitable employment, and the amount is based essentially upon the difference between his average earnings before and after the accident; whereas, for the specific loss or loss of use of the enumerated members, the award is fixed in the act.

In the instant case it is apparent that plaintiff's injury does not come within the terms of sections 8(f) or 8(d), since he sustained no disability to pursue his usual em-

ployment; nor is plaintiff's injury listed in the enumeration of specific losses of members. Defendant, however, argues that plaintiff's injury comes under the category specified in section 8(e) (15), which refers to the loss of testicles. Defendant reasons that since impotency may be an incident of the loss of testicles, therefore, where impotency is produced from other causes, it must also be construed as a loss of testicles.

This rationale is without logic and cannot be accepted, since it is patent that the injury sustained by plaintiff was not the loss of testicles, but a ruptured urethra and involved a different part of the body with different anatomical consequences; and there is no allegation or proof that the injury to the urethra necessarily involves the loss or loss of use of testicles. The omission in section 8(e) of the act of an injury of the nature sustained by plaintiff cannot be supplied by resort to medical fiction, and, therefore, plaintiff's injury may not properly be deemed to be covered by the Workmen's Compensation Act.

In the light of this analysis of the purport of the act, we shall examine the terms and provisions of the controverted section 5(a). The relevant portion of this section provides: "No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this Act."

It is apparent that this section substitutes the system of compensation for the former common-law and statutory right to damages. The provision is designed to prevent an employer from being held liable to his employee for both compensation and common-law damages for the same injury; it is not intended to deprive an employee of his common-law right to damages for negligence, without accord-

ing him a substitute right to compensation under the terms of the act. The rationale is evident from the phrases "other than the compensation herein provided," and "employee who is covered by the provisions of the Act," which indicated that where compensation is provided under the act there shall no longer be the additional common-law or statutory right against the employer.

Although the issue of applying such a statutory provision as section 5(a) in a case where the employee sustains an injury apparently not covered by the Workmen's Compensation Act, as in the instant case, is without precedent in Illinois, it has been adjudicated in comparable cases in other jurisdictions. Those decisions, however, predicated upon the terminology and legislative history of the particular statute barring the common-law action, must be deemed to be of limited persuasive value. Nevertheless, reference should be made thereto.

The Louisiana Court in Boyer v. Crescent Paper Box Factory, 78 So. 596, held that a common-law action for damages would lie on behalf of a woman who caught her hair in a movable belt, not-withstanding a provision in the State compensation act that the rights and remedies granted to an employee therein, on account of a personal injury for which he is entitled to compensation under the act, shall be exclusive of all other right and remedies. The court pointed out that the compensation act did not provide for compensation for the injuries sustained by the plaintiff, and consequently her right to damages could not be deemed to be excluded by that provision of the act.

The Minnesota court has also held that a compensation act is a substitute for the common law on the subject which it covers and so far as it goes, but it does not affect rights not within its purview. (Donnelly v. Minneapolis Mfg. Co.

161 Minn. 240, 201 N.W. 305; Lloyd v. Minnesota Valley Canning Co. 224 Minn. 305, 28 N.W. 2d 697). The court in the Donnelly case stated: "The construction of the statute contended for (similar to defendant's argument herein) would dstroy a long existing common-law right without giving anything in return therefor. It would be both unwise in policy, as tending to promote carelessness among employers, and repugnant to justice." Although the Lloyd case was distinguished in Frank v. Anderson Bros. 236 Minn. 81, N.W. 2d 805, where the injury was deemed to be compensable, the rule enunciated by the Minnesota court in the earlier cases is not affected by the determination in the Frank case, where the injury is not within the purview of the compensation act.

Similarly courts have held that provisions comparable to section 5(a) in State compensation acts do not take away the employee's right to common-law damages for an occupational disease in the absence of or outside the scope of an occupational disease act. Estelle v. Board of Education, 26 N.J. Super. 9, 97 A. 2d I; General Printing Co. v. Unback, 100 Ind. A. 285, 195 N.E. 281; Jones v. Rinehart Co. 113 W. Va. 414, 168 S.E. 482; Barrencotto v. Cocker Saw Co. 266 N.Y. 139, 194 N.E. 61; Triff v. National Bronze & Alum. Foundry Co. 135 Ohio S. 191, 20 N.E. 2d 232.

In the Barrencotto case the New York court states: "• • • these provisions (relating to the compensation act as the exclusive remedy) affect only those who are within the purview of the statute, and while as to them the remedy suggested would be exclusive, it would not apply to others who did not come within the provisions of the Act."

In the Triff case the Ohio court pointed out that it was an obvious injustice to allow some employees who contract

an occupational disease compensation, and leave others remediless, without even damages for negligence; and consequently the words of the provision in that State compensation act barring common-law actions against employers should be construed in the light of the purposes of that act so as to allow a common-law right of action for a noncompensable occupational disease.

Irrespective of these authorities, or the contrary decisions cited by defendant (Lee v. American Enka Corp. 212 N.C. 455, 193 S.E. 809; Thomas v. Parker Rust Proof Co. 284 Mich. 260, 279 N.W. 504,) it is evident that if section 5(a) of the act were construed as defendant contends so as to bar plaintiff's common-law right to damages for the negligence of his employer even where the injury sustained is not covered by the Workmen's Compensation Act, that section could be deemed to deprive plaintiff of a property right without due process of law as guaranteed by the State and Federal constitutions. The Workmen's Compensation Act was originally sustained as a reasonable exercise of the police power, which provided a more certain recovery for industrial injuries by eliminating certain common-law defenses of the employer and limiting the amount recoverable by the employee. (Grant Trunk Western Railway Co. v. Industrial Com. 291 Ill. 167.) However, if the act is held to bar the employee's common-law action, and at the same time to provide no substitute remedy or right to compensation for the particular injury sustained, then the act becomes an unreasonable exercise of the police power affecting an arbitrary classification among employees.

It is the opinion of this court that no such construction of section 5(a) is warranted from the terms of this provision construed in the light of the purport of the Workmen's Compensation Act. Furthermore, it is an ele-

mentary canon of statutory construction that a court should adopt a construction whereby a statute may be deemed valid in preference to one which will render it unconstitutional.

On the basis of this analysis, therefore, it appears that the injury of the nature sustained by plaintiff as set forth in the pleadings was not covered by the provisions of the Workmen's Compensation Act; that recovery for such injury in a common-law action for damages predicated upon the employer's negligence was not barred by section 5(a) of the act, which, properly construed, bars common-law or statutory rights to damages only for injuries which are compensable under the act, but not non-disabling injuries for which no remedy is provided in the Workmen's Compensation Act; and that if the section were construed otherwise it would offend constitutional doctrines. Consequently the circuit court of Peoria County erred in denying plaintiff's motion to strike defendant's motion to dismiss the complaint, and in dismissing plaintiff's cause and entering judgment for defendant. That judgment is reversed, and the cause is remanded with directions to reinstate the complaint.

Reversed and remanded, with directions.

FINAL OPINION OF ILLINOIS SUPREME COURT

RAYMOND MOUSHON, Appellant,

v.

NATIONAL GARAGES, Inc., Appellee.

No. 33536

Supreme Court of Illinois.

Sept. 25, 1956.

Rehearing Denied Nov. 19, 1956.

Employee brought action against employer for injuries. The Circuit Court of Peoria County, Howard White, J., entered judgment adverse to the employee, and he appealed. The Supreme Court, Hershey, J., held that section of the Workmen's Compensation Act providing that no common law or statutory right to recover damages for injury or death sustained by any employee while engaged in line of his duty as such employee, other than compensation provided for by the act, shall be available to any employee who is covered by the act, barred common law action, by employee against employer for injuries, which allegedly rendered him impotent, irrespective of any right of employee to recover under section of the Workmen's Compensation Act providing compensation for the loss of both testicles, and that such section of the Workmen's Compensation Act is not unconstitutional on ground that it violates due process.

Judgment affirmed.

Bristow, J., dissented.

1. Courts 219.8(14)

Where question of constitutionality of certain section of the Workmen's Compensation Act was involved in personal injury action, Supreme Court had jurisdiction of appeal. Ill. Rev. Stat. 1951, c. 48, 138.5(a).

2. Workmen's Compensation 2090

Section of the Workmen's Compensation Act providing that no common law or statutory right to recover damages for injury or death sustained by any employee while engaged in line of his duty as such employee, other than compensation provided for by the act, shall be available to any employee who is covered by the act, barred common-law action by employee against employer for injuries, which allegedly rendered him impotent, irrespective of any right of employee to recover under section of the Workmen's Compensation Act providing compensation for the loss of both testicles. Ill. Rev. Stat. 1951, c. 48, 138.5(a), 138.8(e).

3. Workmen's Compensation 2084

The Workmen's Compensation Act was designed as a substitute for previous rights of action of employees against employers and to cover the whole ground of liabilities of employer. Ill. Rev. Stat. 1951, c. 48, 138.5(a).

4. Constitutional Law 307

Workmen's Compensation 19.

Section of the Workmen's Compensation Act providing that no common law or statutory right to recover damages for injury or death sustained by any employee while engaged in line of his duty as such employee, other than compensation provided for by the act, shall be available to any

employee who is covered by the act, is a reasonable exercise of the Legistature's police power for the promotion of the general welfare and is not unconstitutional on ground that it violates due process. U.S.C.A. Const. Amend. 14; S.H.A. Const. art. 2, 2; Ill. Rev. Stat. 1951, c. 48, 138.5(a).

Robert G. Day, Peoria, for appellant.

Shore & Coney and Richard E. Capitelli, Peoria, for appellee.

HERSHEY, Justice.

(1) By his suit in the circuit court of Peoria County, the plaintiff, Raymond Moushon, sought to recover damages for a personal injury caused by the alleged negligence of his employer, National Garages, Inc. But the court allowed the defendant's motion to dismiss on the ground that section 5(a) of the Workmen's Compensation Act barred the action. (Ill. Rev. Stat. 1951, chap. 48, par. 138.5) After the plaintiff elected to stand by his complaint, judgment was entered for the defendant. The appeal comes to this court on the theory that a constitutional question in involved.

The issue is two-fold: (1) Does section 5(a) of the Workmen's Compensation Act bar the plaintiff's suit? (2) If so, is the statute as so construed constitutionally valid?

The plaintiff was injured in the course of his employment for the defendant when a safety device on the "man lift" which he was riding failed to operate. He alleges that "his internal organs were greatly crushed and bruised including a ruptured urethra, which injuries have not permanently disabled (him) from engaging in his usual type of work but have rendered him impotent and have caused him great pain and suffering."

The parties agree that the employment was such as to automatically be covered by the Illinois Workmen's Compensation Act and thereby subject the plaintiff-employee and the defendant-employer to its terms. It is also agreed that the injury resulted from an "accident" within the meaning of the statute and arose out of and in the course of the employment.

The defendant provided medical, surgical and hospital services reasonably necessary to cure and relieve from the effects of the injury, as required by section 8(a) of the act. (Ill. Rev. Stat. 1951, chap. 48, par. 138.8.) The defendant also paid, and the plaintiff received, compensation for the period of his temporary total disability, in accordance with section 8(b) of the act. The plaintiff's claim before the Industrial Commission, in which relief is asked under section 8(e) for loss of use of both testicles, is still pending.

On these admitted facts, we think that section 5(a) of the act constitutes a bar to the plaintiff's common-law action. This section provides, in part, as follows: "No common law or statutory right to recover damages for injury or death sustained by any employee in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this Act, * * *"

The plaintiff takes the position that the foregoing is inapplicable where the injury does not fit a category specified by section 8(e). But this ignores the fact that he is still an employee "who is covered by the provisions of this Act," and more, the injury is admittedly compensable under other of its provisions.

Actually, it is difficult to see that any defense could exist to a claim for compensation under section 8(e) as well.

Since the amendatory act of 1951, the section is not limited to the loss of both testicles, but covers also their permanent and complete loss of use. Even prior to this amendment, this court held that the act did not require "physical severance of the testicles" but included loss "in the more serious sense that they never again could perform their normal function having to do with sexual intercourse and the propagation of offspring." Northwestern Barb Wire Co. v. Industrial Comm., 353 Ill. 371, 187 N.E. 468, 470. This is precisely the injury which the plaintiff claims here. And that the Industrial Commission regards such an injury compensable as a loss of use of both testicles is indicated by its award in Anderson Shumaker Co. v. Industrial Comm., No. 33564, in which we denied a writ of error at the March, 1955, term. In that case, as here, the injury consisted primarily of a ruptured urethra. See Gray, Attorney's Textbook of Medicine, vol. 3, sec. 301.07.

(2) Yet even if it be assumed that the injury is not under section 8(e), it does not follow that the plaintiff should prevail. He still is covered by the act and sustained an accidental injury for which he received compensation benefits. Therefore, by its clear import section 5(a) bars his suit.

(3) This is consistent with the legislative purpose of the statute. "The act was designed as a substitute for previous rights of action of employees against employers and to cover the whole ground of the liabilities of the master, and it has been so regarded by all courts. * * * It is therefore clear that the words 'accident' and 'accidental injuries,' used in the act, were meant to include every injury suffered in the course of employment for which there was an existing right of action at the time the act was passed; also, to extend the liability of the employer to make compensation for injuries for which he was not previously liable and to limit such compensation. The act, in taking

away existing rights of action of the employee and extending the liabilities of the employer, fixes limits to the amount to be recovered, and is sustained as a legitimate exercise of the police power for the promotion of the general welfare by covering the entire subject with fixed rules." Matthissen & Hegeler Zinc Co. v. Industrial Board, 284 Ill. 378, 382-383, 120 N.E. 249, 251.

The general view regarding the particular problem before us here is expressed as follows by a leading writer in this field: "The compensation remedy is exclusive of all other remedies for the same injury, if the injury falls within the coverage formula of the act. If it does not, as in the case where occupational diseases are deemed omitted because not within the concept of accidental injury, the compensation act does not disturb any existing remedy. However, if the injury itself comes within the coverage formula, common-law action is barred even though the particular element of damage is not compensated for, as in the case of disfigurement in some states, impotency, or pain and suffering." (Larson, Workmen's Compensation Law, sec. 65.00.) At section 65.10 of the cited text the author states a reason for the compensation act affording the exclusive remedy: 'This is part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts."

The plaintiff refers to decisions of other jurisdictions involving noncompensable occupational diseases or injuries for which no compensation was provided by statute. They are not analogous to the instant case. Apart from statutory and factual differences, the employees did not qualify for benefits under the applicable statutes. The courts were not called upon, as is this court, to permit a recovery

under the Workmen's Compensation Act and then permit also a suit at common law against the same person, to recover additional damages said to arise out of and be connected with the same accidental injury constituting the basis for the one cause of action. See Hyett v. Northwestern Hospital, 147 Minn. 413, 180 N.W. 552.

Having determined that the statute is applicable, we next consider its constitutionality as against asserted violations of due process (Ill. Const. art. II, sec. 2, S.H.A.; U.S. Const. 14th Amend.) and other provisions of the Illinois constitution.

(4) By the Workmen's Compensation Act, the legislature required the employer to give up certain defenses and required the employee to give up certain recoverable elements of damage of common-law negligence action; and this we have held many times is a reasonable exercise of the legislature's police power for the promotion of the general welfare. See, for example, Grand Trunk Western Railway Co. v. Industrial Comm., 291 Ill. 167, 125 N.E. 748; Matthiessen & Hegeler Zinc Co. v. Industrial Board, 284 Ill. 378, 120 N.E. 249. This court has never considered one to have such a vested right in the common-law rules governing negligence actions as to preclude the legislature from substituting a statutory remedy of this type for the common-law remedy.

For the reasons stated, the judgment of the circuit court of Peoria County is affirmed.

Judgment affirmed.

BRISTOW, Justice (dissenting).

I cannot agree with the conclusion of the majority opinion that plaintiff's injury is compensable under section 8(e) or any other section of the Workmen's Compensation

Act, or that section 5(a) of the act constitutes a bar to this proceeding.

Compensation awards are provided under the act for partial incapacity (section 8(d)); permanent total disability (section 8(f); and for enumerated specific loss or loss of us of bodily members (section 8 (e)).) Partial incapacity and permanent total disability are predicated upon the employee's inability to pursue his usual or suitable employment, and the amount is based essentially upon the difference between his average earnings before and after the accident; whereas for the specific loss, or loss of use of the enumerated members, the award is fixed in the act.

In the instant case it is apparent that plaintiff's injury does not come within the terms of section 8(f) or 8(d), since he sustained no disability to pursue his usual employment; nor is plaintiff's injury listed in the enumeration of specific loss of members, as the majority opinion suggests. The injury sustained by plaintiff was neither the loss, nor the loss of use of testicles, referred to in section 8(e), but a ruptured urethra, involving a different part of the body with different anatomical consequences. Moreover, there is no allegation or proof that the injury to the urethra necessarily involved the loss or loss of use of testicles. I cannot accept defendant's reasoning, as did the majority opinion, that since impotency may be an incident of the loss of testicles, as in Northwestern Barb Wire Co. v. Industrial Comm., 353 Ill. 371, 187 N.E. 468, therefore, where impotency is produced from other causes it must also be considered as a loss or loss of use of testicles. Consequently, it is my judgment that the omission in section 8(e) of the act of a specific award of compensation for an injury of the nature sustained by plaintiff, or of a blanket provision such as is found in other workmen's com-

pensation statutes, cannot be supplied by resort to medical fiction. Therefore, plaintiff's injury, though allegedly arising out of and in the course of his employment cannot be deemed to be compensable under the act.

The majority opinion asserts further that even if it be assumed that the injury is not under section 8(e), plaintiff's action is barred by section 5(a) of the act. The relevant portion of this section provides: "No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this Act".

The obvious purport of this provision is to protect employers from being held liable for both compensation and damages for the same injury. However, the phrases "other than the compensation herein provided" and "employee who is covered by the provisions of this Act" indicate that a substitute remedy is envisaged, and that the common-law remedy is abolished only where the substitute remedy of compensation is provided under under the terms of the act.

In Matthiessen & Hegeler Zinc Co. v. Industrial Board, 284 Ill. 378, 120 N.E. 249, cited by the majority opinion, the court emphasized that where existing remedies were taken away, fixed amounts of compensation were provided. There is nothing contained therein to the effect that, irrespective of whether the act authorizes compensation, the employee should nevertheless be deprived of any remedy.

There does not appear to be any other determinative precedent in Illinois on the issue of whether section 5(a) bars a common-law action for a noncompensable injury, as in the instant case.

The decisions of other States, predicated upon the terminology and legislative history of the particular Workmen's Compensation Act, reflect a sharp cleavage of judicial opinion. 100 A.L.R. 519; 121 A.L.R. 1143, et seq. However, the great weight of authority, apparently disregarded by the majority opinion, holds that the workmen's compensation acts do not constitute an exclusive remedy barring an action at common law where the injury is not compensable under the acts. 100 A.L.R. 519; 121 A.L.R. 1143, and cases cited; 71 C.J. 1482-1483; Rosenfield v. Matthews, 201 Minn. 113, 275 N.W. 698; II Larson, Workmen's Compensation, 135.

In the annotation appearing in 121 A.L.R. 1143, it is stated: "In harmony with the great weight of authority as shown in the earlier annotation, it was held in the following later cases under statutes and facts involved, that the workmen's compensation acts did not constitute an exclusive remedy as to bar an action at common law or under a statute to recover for injury or disease which was not compensable under the act."

The rule has been applied not only where the injury suffered was not caused by an accidental injury arising out of and in the course of employment, but also, as in the instant case, where the injury did not result in a disability recognized in either the workmen's compensation or occupational disases acts of the particular jurisdiction. 71 C.J. 1483; Shinnick v. Clover Farms Co., 169 App. Div. 236, 154 N.Y.S. 423; Boyer v. Crescent Paper Box Factory, 143 La. 368, 78 So. 596; Clark v. Banner Grain Co., 195 Minn. 44, 261 N.W. 596; Kane v. Federal Match Corp., D.C., 5 F. Supp. 507; Boal v. Electric Storage Battery Co 3 Cir., 98 F. 2. 815; Billo v Allegheny Steel Co., 328 Pa. 97, 195 A. 110; Triff v. National Bronze & Alum. Foundry Co., 135 Ohio St. 191, 20 NE. 2d 232, 121 A.L.R. 1131;

Young v. Salt Lake City, 97 Utah 123, 90 P. 2d 174; Peerless Woolen Mills v. Pharr, 74 Ga. App. 459, 40 S.E. 2d 106; Pershing Quicksilver Co. v. Thiers, 62 Nev. 382, 152 P. 2d 432; Jackson v. Pacific Gas & Electric Co., 95 Cal. App. 2d 204, 212 P. 2d 591; McDaniel v. Kerr, 364 Mo. 1, 258 S.W. 2d 629; Kress v. City of Newark, 8 N.J. 562, 86 A. 2d 185.

In Clark v. Banner Grain Co. the court held that an employee could maintain a common-law action for damages against his employer for bronchial asthma caused by the employer's negligence where such injury was not compensable under the act. In Boal v. Electric Storage Battery Co., the Federal court, following Billo v. Allegheney Steel Co. held that under the Pennsylvania Workmen's Compensation Act an employee could maintain a common-law action for negligence against his employer for cancer caused by exposure to sulphuric acid, since the injury was neither covered by the Workmen's Compensation Act nor the Occupational Diseases Act. Moreover, common-law actions were allowed for dye poisoning, Pershing Quicksilver Co. v. Thiers; for electric shock, Jackson v. Pacific Gas & Electric Co., for sundry lung ailments, McDaniel v. Kerr, 1953, 364 Mo. 1, 258 S.W. 2d 629; and for X-ray burns, Kress v. City of Newark, 1951, 8 N.J. 562, 86 A. 2d 185.

In Triff v. National Bronze and Alum. Foundry Co., 135 Ohit St. 191, 20 N.E. 2d 232, 121 A.L.R. 1131, the Ohio court reversed its position held in an earlier case, and allowed a common-law action for damages for a noncompensable occupational disease. The court pointed out that it was an obvious injustice to allow compensation to some employees who contracted an occupational disease, and to leave others remediless, without even damages for negligence.

The courts in the foregoing cases, in allowing the in-

jured employee common-law damages, notwithstanding statutory provisions comparable to section 5(a), predicated their conclusions upon the presumed legislative intent. After finding that the particular disease was not compensable under either the Workmen's Compensation Act or the particular Occupational Diseases Act, the courts reasoned that the legislature did not intend to leave the employee remediless where he was the victim of the employer's negligence, and consequently were loathe to take away the right of recovery available prior to the enactment of the compensation statute.

While there may be a technical distinction between those occupational disease cases where the injury could not be deemed to be within the coverage of the Workmen's Compensation or Occupational Diseases acts and the instant case, where the employee sustained an accidental injury within the coverage of the act but one for which no compensation benefits were provided, that distinction is without substance. In each case the employee has suffered bodily damage through the negligence of the employer, for which no remedy is given under the Workmen's Compensation Act, although a common-law right to damages existed prior to the passage of the act. The same cogent reasons exist for reserving that common-law right in both types of cases, and the rationale of the courts in allowing common-law damages in the occupational disease cases is equally applicable herein, where the employee is also deprived of a remedy for his injury.

This conclusion has also been advanced by text writers. In II Larson, Workmen's Compensation, p. 136, it is said: "If this is the justification for the exclusive remedy rule, it ought logically to follow that the employers should be spared common-law liability only when compensation liability has actually been provided in its place, or, to state

the matter from the employee's point of view, common-law rights of action should not be deemed taken away except when something of value has been put in their place." Moreover, contrary to the implication in the majority opinion this authority does not assert that the injured employee be remediless, but rather that recovery for such nondisabling injuries should be predicated upon common-law negligence, as in the instant case. II Larson, Workmen's Compensation, p. 140.

In further support of its conclusion that plaintiff's action is barred, the majority opinion cites Hyett v. Northwestern Hospital, 147 Minn. 413, 180 N.W. 552. However, in that case, in contrast to the case at bar, the employee after receiving a compensation award for his accident injury brought a common-law claim for additional damages for impotency, and the court held that he could not secure and retain both compensation and damages. In the instant case the employee received some medical payment and some temporary disability payments, but no award of compensation for the serious permanent injury he sustained; nor could any such compensation award be entered under the terms of the act without resort to medical fiction.

I am in agreement with the principle enunciated in the Hyett case that an employee should not be entitled to secure both damages and compensation from his employer; it is my opinion, however, that where the injury sustained is not compensable under act, either because it is not an accidental injury arising out of and in the course of employment, or because no compensation benefits are provided in the act for the particular injury, so that no remedy is afforded the employee under the act for an injury caused by the employer's negligence, then a common-law action for damages should be allowed. On the other hand, where

benefits are provided under the act for the permanent injury sustained, then, even though there are elements of damages such as pain and suffering for which no compensation is provided, no common-law negligence action should be maintained.

Admittedly all the cases in the various jurisdictions cannot be reconciled or integrated into a smooth fabric of law. There is cogency in the reasoning of those courts denying common-law damages on the ground that they tend to nullify the objectives of the Workmen's Compensation Act by subjecting employers to liability for both damages and compensation; nevertheless, the result ordered by the majority opinion is a harsh and unjust one, denying plaintiff both compensation for his permanent injury and common-law damages, contrary to the terminology of section 5(a) of the act, as well as judicial authority and the public policies underlying such compensation legislation.

As aptly stated by the Ohio court in the Triff case (135 Ohio St. 191, 20 N.E. 2d 239): "Since the underlying purpose of compensation is to make industry bear the burden of human wreckage by paying stated awards for injury and loss of life in the course of employment, the court should avoid a strained construction which would leave many employees, who are blameless victims of their employer's torts, without either damages or compensation and absolutely remediless."

Furthermore, I cannot agree with the statement in the majority opinion that section 5(a) would be constitutional if construed to bar plaintiff's action. The Workmen'sCompensation Act was originally sustained as a reasonable exercise of the police power on the assumption that it effected a compromise whereby employers, in return for liability in limited sums relinquished their common-law defenses, and employees gave up their right to damages

in return for more certain recovery. Grand Trunk Western Railway Co. v. Industrial Comm., 291 Ill. 167, 125 N.E. 748. However, if the act is held to bar the employee's common-law action, and at the same time provides no substitute remedy other than, in this instance, temporary disability benefits, but no award for permanent injury, then the act becomes an unreasonable exercise of the police power, effecting an arbitrary classification among employees, in violation of the due-process guarantees of the State and Federal constitutions. Grasse v. Dealer's Transport Co., 412 Ill. 179, 106 N.E. 2d 124.

It is my opinion that no such construction of section 5(a) is warrant from its own terms, and should not be adopted, particularly in view of the established canon of statutory construction that an intepretation which will render an act valid should be preferred to one which will render it unconstitutional.

On the basis of this anlysis, the nondisabling injury sustained by plaintiff as set forth in the pleadings was not covered by the schedule of awards of compensation under the act, except through medical fiction; that recovery for such injury in a common-law action for damages was not barred by section 5(a) of the act, which, properly construed, bars only actions for injuries which are compensable under the act; and that if the section were construed otherwise, it would offend constitutional doctrines. Consequently, I am constrained to dissent from the majority opinion and hold that the circuit court of Peoria County erred in dismissing plaintiff's cause and in entering judgment for defendant.

UNITED STATES OF AMERICA

State of Illinois,
Supreme Court, ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the tenth day of September in the year of our Lord, one thousand nine hundred and fifty-six, with in and for the State of Illinois.

PRESENT: Ray I. Klingbiel, Chief Justice, Justice Joseph E. Daily, Justice Walter V. Schaefer, Justice George W. Bristow, Justice Harry B. Hershey, Justice Charles H. Davis. Latham Castle, Attorney General, Robert G. Miley, Marshal. Attest: Fae I. Searcy, Clerk Pro Tempore.

Be It Remembered, that, to-wit: on the 25th day of September 1956, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

RAYMOND MOUSHON, Appellant

vs.

NATIONAL GARAGES, Incorporated, a corporation, Appellee

No. 33536

APPEAL FROM CIRCUIT COURT PEORIA COUNTY
42976

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises

for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

THEREFORE, it is considered by the Court that the judgment of the Circuit Court of Peoria County aforesaid, BE AFFIRMED IN ALL THINGS AND STAND IN FULL FORCE AND EFFECT, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellee recover of and from the said appellant costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, FAE I. SEARCY, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said court this 28th day of November, 1956.

FAE I. SEARCY

Clerk pro tempore,

(SEAL) Supreme Court of the State of Illinois

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 892

RAYMOND MOUSHON, *Plaintiff-Appellant*

v.

NATIONAL GARAGES, INC., *Defendant-Appellee*

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves the Court to affirm the judgment below or to dismiss this appeal on the ground that it does not present a substantial Federal question.

STATEMENT

This is a direct appeal from a final order of the Supreme Court of Illinois affirming a judgment of the Circuit Court of Peoria County, Illinois, which dismissed appellant's complaint. Appellant predicates

the jurisdiction of this Court upon 28 U.S.C. § 1257 (2).

Appellant filed an action for damages for personal injuries in the Circuit Court of Peoria County, Illinois, against appellee, his employer. He alleged that while in the course of his employment he sustained an accident through the negligence of his employer, which resulted in personal injuries, to wit: "his internal organs were greatly crushed and bruised including a ruptured urethra which injuries have not permanently disabled [him] from engaging in his usual type of work but have rendered him impotent and have caused him great pain and suffering." (Amended Complaint, Supp. Rec. 20)

A motion to dismiss the action based upon appellant's coverage and receipt of benefits under the Illinois Workmen's Compensation Act, and upon the exclusive liability provision of that Act, § 5(a), Ill. Rev. Stat., 1951, Chap. 48, sec. 138.5, was granted.

Section 5(a) of the Illinois Workmen's Compensation Act provides in pertinent part:

> "No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this Act . . . ."

The Court below found that appellant's employment was such as to be covered automatically by the Illinois Workmen's Compensation Act; that the parties were subject to its terms; that appellant's injury resulted from an "accident" within the statutory meaning of the term and arose out of and in the course

of his employment; that his employer, the appellee, provided appellant with medical, surgical and hospital services for the care of his injuries, as required by section 8(a) of the Act, and that appellant was paid sums for temporary total disability, as required by section 8(b) of the Act.

Appellant has also filed with the Illinois Industrial Commission a claim for "the permanent and complete loss of use of both testicles" under section 8(e)(15) of the Act (see Jurisdictional Statement, p. 18). This claim is still pending before the Commission, awaiting appellant's request to proceed.

Following dismissal of his action in the trial court, appellant appealed to the Supreme Court of Illinois. The case was at first reversed, but on rehearing the judgment of dismissal was affirmed. The opinion below is reported at 9 Ill. 2d 407, 137 N.E. 2d 842 (1956).

Appellant, in this Court, alleges a violation of the "due process" and "equal protection" clauses of the 14th Amendment.[1] In his statement of the question presented he declares (Jurisdictional Statement, p. 4): "The Supreme Court of Illinois held that plaintiff could not recover for the permanent effects of his injury under the terms of the Compensation Act, and that he did not have the right to sue at common law because the Compensation Act prevents the filing of a common law suit."

[1] Part of appellant's argument (Jurisdictional Statement, pp. 14, 19) is allegedly based on a syllabus which he quotes in an Appendix to his Jurisdictional Statement. That syllabus was not prepared by the Illinois Supreme Court, it differs from the official syllabus, and appellant's characterization of it is not accurate. The syllabus which appears in the official Illinois report, 9 Ill. 2d 407, 137 N.E. 2d 842 (1956), together with the Court's opinion, is set forth in an appendix to this motion.

The Supreme Court of Illinois, however, held that appellant was covered by the Illinois Act and was entitled to substantial benefits under it. Furthermore, the Court strongly indicated that if appellant would prosecute to finality his claim before the Illinois Industrial Commission for an award for permanent disability for his precise injury, he would be successful and the award would be sustained by the Court.

Appellant further contends that the Illinois Act is "arbitrary and unreasonable" because it compensates for the loss of a bodily member, or for partial or total disability affecting employability, but fails to compensate for disability not involving the loss of a bodily member or affecting employability.

The short answer to this contention is that the loss of a bodily member is not the basis of classification under the Act. As the Illinois Supreme Court pointed out, physical severance of a bodily member is not necessary to compensability. The statute itself and prior opinions of that Court make it clear that a loss of use or function is all that is required. A loss of use or function is the precise injury sustained by appellant.

The real question presented by this case, therefore, is whether an employee's constitutional rights are infringed by a provision of the Illinois Workmen's Compensation Act, section 5(a), which bars an action at law for damages against his employer for an alleged item of damage which the employee says is not compensable, under circumstances where the employee has already received, for the same accidental injury, compensation benefits under the Act, where he is covered by the Act, where the accident arose out of and in

the course of his employment, and where he will probably receive additional compensation for his precise item of damage if he will only proceed with his remedy before the Illinois Industrial Commission.

ARGUMENT

This appeal does not present a substantial Federal question. The principles which govern its disposition are of long standing, well established and predicated upon sound policy.

The Illinois Workmen's Compensation Act, Ill. Rev. Stat., 1951 Chap. 48, par. 138.1 et seq., is a broad statutory scheme of compensation applicable to industrial injury. Liability for the payment of the prescribed compensation does not depend upon fault, § 1. Application of the Act to covered employments is mandatory, §§ 1, 3. The employer is required to carry workmen's compensation insurance, or a suitable substitute, § 4. Administration of the Act is entrusted to an Industrial Commission, §§ 1(e), 13. For non-fatal injury an extensive schedule of compensation is prescribed, § 8. The employer is commanded to provide "medical, surgical and hospital services . . . required to cure or relieve from the effects of accidental injury," § 8(n), to pay a portion of the employee's weekly wage during periods of temporary total incapacity for work, § 8(b), to pay for permanent total or partial incapacity for work, § 8(d)(f), and to pay for either the loss of a bodily member or the loss of use of the same, § 8(e).

The constitutionality of such a statute as a valid exercise of state police power over the employment relationship has long been sustained. *New York Central R. Co.* v. *White,* 243 U.S. 188 (1917).

This Court in *Middleton* v. *Texas Power & Light Co.*, 249 U.S. 152, 163 (1919), said:

> " . . . a plan imposing upon the employer responsibility for making compensation for disabling or fatal injuries irrespective of the question of fault, and requiring the employee to assume all risk of damages over and above the statutory schedule, when established as a reasonable substitute for the legal measure of duty and responsibility previously existing, may be made compulsory upon employers as well as employees."

The purpose of workmen's compensation legislation was to provide a comprehensive statutory scheme of compensation for industrial injury regardless of fault. The social evil to be avoided was the impact which loss of the weekly paycheck and large medical bills visited upon the worker and his family, often leaving them destitute. The employer was to bear the cost of medical treatment and to pay for the loss of employment and employability. The theory was that this risk bearing could be spread in the cost of the product. This is the theory of the Illinois legislation, comparable in every respect to that of New York, approved in *New York Central R. Co.* v. *White, supra.*

1. In its opinion, the Illinois Supreme Court notes that in addition to payment already received, appellant still has pending his claim for compensation for the alleged permanent effects of his injury under § 8(e) of the Act. Appellant asks this Court to anticipate the outcome of that claim, and thereby invites this Court to decide a hypothetical question: namely, whether due process of law would be offended should he fail of an award. Such a ruling would be contrary to the inviolate practice of this Court.

Furthermore, as the Illinois Court significantly indicated, plaintiff should pursue his remedy before the Industrial Commission where his chances for success are excellent, and where any award would be sustained on appeal to the Court. It stated: "Actually it is difficult to see that any defense could exist to a claim for compensation under section 8(e) as well [i.e., for loss of use of both testicles as well as compensation for industrial disability already received by appellant]."

Section 8(e) has been most liberally construed by the Industrial Commission and the Illinois Courts. To recover under it, appellant does not have to show physical severance of the testicles, but only loss of their use "in the more serious sense that they never again could perform their normal function having to do with sexual intercourse and the propagation of offspring." *Northwestern Barb Wire Co.* v. *Industrial Commission,* 353 Ill. 371, 187 N.E. 468 (1933). A 1951 amendment to the Act wrote this interpretation into section 8(e). This section, which previously covered the loss or loss of use of every bodily member *except testicles,* was specifically extended by the amendment to cover the loss of "or the permanent and complete loss of use of" testicles.

The Illinois Industrial Commission, in *Anderson Shumaker Co.* v. *Industrial Commission,* Ill. Sup. Ct., No. 33564, March Term, 1955, made an award for a ruptured urethra, the same injury suffered by appellant, under section 8(e) of the Act on the theory that such an injury was compensable as a "loss of the use of both testicles." The Illinois Supreme Court in its opinion below pointed out that it permitted the decision of the Industrial Commission in the *Anderson*

Shumaker case to become final by denial of a writ of error.

In the face of the Illinois Supreme Court's assertion that appellant probably will obtain compensation for his injured urethra as a "loss of use of testicles," appellant takes the position that:

> " . . . [T]his court should review the ruling of the Illinois Court for the purpose of determining whether there is justification in the record for that ruling." (Jurisdictional Statement, p. 14)

It is superfluous to point out that it is not this Court's function in this type of case to review the findings of fact of the Court below or its interpretation of a local statute. *Guaranty Trust Co.* v. *Blodgett,* 287 U.S. 509, 513 (1933); *Portland Railway Co.* v. *Railroad Commission,* 229 U.S. 397, 411-412 (1913).

2. Appellant's right to maintain an action for damages does not depend solely upon the outcome of his pending claim under section 8(e). Regardless of the outcome of that claim, appellant comes within, and is covered by, the Act. This is *not* a case, as appellant would have the Court believe, in which appellant is denied a remedy for his injuries unless he obtains a recovery in a common law action. On the contrary, his statement that the "issue before [this] Court is . . . whether he has any remedy at all" is entirely specious in view of the extensive compensation already paid for the same accidental injury that forms the basis of his common law suit.[3]

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[3] Moreover, appellee's payments under section 8(a) may not yet be complete. The Illinois Supreme Court has interpreted this section to mean that "the employer's liability continues as long as medical, surgical and hospital services are required in order to

Under the particular circumstances of this case, appellant's position comes to no more than a claimed right to split a cause of action and to pursue two remedies for the same accidental injury. Such a ruling by this Court would be destructive of all comprehensive statutory schemes of compensation. Appellant, moreover, does not have, as he would argue, a vested or constitutional right to maintain a common law action against his employer when there has been a substitution by the legislature of another form of remedy. *Mountain Timber Co.* v. *Washington*, 243 U.S. 219, 236 (1917).

The conclusion reached by the Court below is in harmony with the decisions of this Court and the highest courts of other jurisdictions.[3] In two such cases which were presented to this Court but which this Court declined to hear, issues fundamentally similar to that raised by appellant were involved. *Cifolo* v. *General Electric Co.*, 305 N.Y. 209, 112 N.E. 2d 197, cert. den. 346 U.S. 874 (1953); *Masich* v. *U. S. Smelting, Refining & Mining Co.*, 113 Utah 101, 191 P. 2d 612, appeal dismissed 335 U.S. 866 (1948).

Both cases were identical in their basic facts. Legislation of Utah and New York provided for compensa-

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relieve the injured employee for the effects of his injury"—apparently without limitation either as to amount or to time. *Newman* v. *Industrial Commission*, 353 Ill. 190, 196, 187 N.E. 137 (1933).

[3] *E.g. Hyett* v. *Northwestern Hospital*, 147 Minn. 413, 180 N. W. 552 (1920); *Smith* v. *Baker*, 157 Okla. 155, 11 P. 2d 132 (1952); *Freese* v. *John Morrell & Co.*, 58 S.D. 634, 237 N.W. 886 (1931); *Blue Bell Globe Mfg. Co.* v. *Baird*, 64 Ga. App. 347, 13 S.E. 2d 105 (1941); *Lee* v. *American Enka Corp.*, 212 N.C. 455, 193 S.E. 809 (1937). See *Morgan* v. *Ray L. Smith & Son*, D. Kan. 1948, 79 F. Supp. 971; see also LARSON'S WORKMEN'S COMPENSATION LAW, § 65.10.

tion for industrially contracted silicosis only if the disease was totally disabling. In each case the employee was partially disabled from the disease and therefore was unable to procure an award of compensation. Each challenged the constitutionality of the legislation which deprived him of his common law remedy, while failing in the particular instance to provide a substitute. In each case, however, the employee had received compensation and medical benefits while he was absent from the work force.

Since each employee was therefore found to be covered by the legislation, the bar of the statute applied despite the particular failure of the Act to provide compensation for a partial disability. Both cases were brought to this Court on the same constitutional arguments now advanced by appellant. This Court apparently thought them not substantial.

The New York Court of Appeals briefly stated the governing principle in the *Cifolo* case, 305 N.Y. at page 215:

> "It has never been doubted that, when an employment is covered into the Act and awards are authorized for injuries and diseases arising out of and in the course of such employment, the fixation of the benefits, in dollars and limitations of periods of payment is solely up to the legislature . . . Workmen's compensation laws balance benefits. The disabled workman loses some of his former rights but gains some new ones.. The sum of it all is this: when the Act makes a particular injury or disease compensable, then the legislature has occupied the field, all other remedies are abrogated, and there is no remedy outside the Act."

Of course, as previously pointed out, it is reasonably certain in the instant case that appellant's alleged impotency, resulting from a damaged urethra, will be further compensated under the Act. He need merely follow the suggestion of the Illinois Supreme Court and proceed upon his pending claim before the Industrial Commission.

Accordingly, appellant having failed to present any substantial question of "due process" or "equal protection" under the 14th Amendment, this appeal should be dismissed or the judgment below affirmed.

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APPENDIX TO
MOTION TO DISMISS OR AFFIRM

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9 Ill. 2nd 407.

No. 33536

RAYMOND MOUSHON, *Appellant,*

vs.

NATIONAL GARAGES, INC., *Appellee.*

Opinion filed September 25, 1956

Rehearing denied November 19, 1956

Judgment Affirmed

1. WORKMEN'S COMPENSATION—*when statute bars employee's action for common-law damages.* Where an employee, injured in the course of his employment, suffers a ruptured urethra resulting in impotency but not causing permanent disability, his complaint for common-law damages predicated on the theory that the particular injury is not covered by the Workmen's Compensation Act should be dismissed where both the employer and employee are operating under the statute and where the latter has received medical care from the former as provided by section 8 (a) of the act and compensation for the period of his temporary total disability in accordance with section 8 (b), his right to a common-law action in damages being barred by section 5 (a) of the act. (p. 410)

2. SAME — *purpose of the Workmen's Compensation Act.* The Workmen's Compensation Act is intended as a substitute for the previous rights of action of an employee against his employer and to cover the whole ground of liability of the master for injuries to his employees, and it is clear that the words "accident" and "accidental injury" as used in the act were meant to include every injury suffered in the course of employment for which there was an existing right of action at the time the act was passed and to extend the liability of the employer to make compensation for injuries for which he was not previously liable and to limit such compensation. (p. 411)

3. Same — *provision barring common-law action is valid exercise of police power.* The Supreme Court has never considered a person to have such a vested right in the common-law rules governing negligence actions as to preclude the legislature from substituting a statutory remedy for the common-law remedy, and the Workmen's Compensation Act, by the terms of which the legislature requires the employer to give up certain defenses and the employee to give up certain recoverable elements of damage in the common-law negligence action, is a reasonable exercise of the police power for the promotion of the general welfare. (p. 412)

Bristow, J., dissenting.

Appeal from the Circuit Court of Peoria County; the Hon. Howard White, Judge, presiding.

Mr. Justice Hershey delivered the opinion of the court:

By his suit in the circuit court of Peoria County, the plaintiff, Raymond Moushon, sought to recover damages for a personal injury caused by the alleged negligence of his employer, National Garages, Inc. But the court allowed the defendant's motion to dismiss on the ground that section 5(a) of the Workmen's Compensation Act barred the action. (Ill. Rev. Stat. 1951, chap. 48, par. 138.5.) After the plaintiff elected to stand by his complaint, judgment was entered for the defendant. The appeal comes to this court on the theory that a constitutional question is involved.

The issue is two-fold: (1) Does section 5(a) of the Workmen's Compensation Act bar the plaintiff's suit? (2) If so, is the statute as so construed constitutionally valid?

The plaintiff was injured in the course of his employment for the defendant when a safety device on the "man lift" which he was riding failed to operate. He alleges that "his internal organs were greatly crushed and bruised including a ruptured urethra, which injuries have not permanently disabled [him] from engaging in his usual type

of work but have rendered him impotent and have caused him great pain and suffering."

The parties agree that the employment was such as to automatically be covered by the Illinois Workmen's Compensation Act and thereby subject the plaintiff-employee and the defendant-employer to its terms. It is also agreed that the injury resulted from an "accident" within the meaning of the statute and arose out of and in the course of the employment.

The defendant provided medical, surgical and hospital services reasonably necessary to cure and relieve from the effects of the injury, as required by section 8(a) of the act. (Ill. Rev. Stat. 1951, chap. 48, par. 138.8.) The defendant also paid, and the plaintiff received, compensation for the period of his temporary total disability, in accordance with section 8(b) of the act. The plaintiff's claim before the Industrial Commission, in which relief is asked under section 8(e) for loss of use of both testicles, is still pending.

On these admitted facts, we think that section 5(a) of the act constitutes a bar to the plaintiff's common-law action. This section provides, in part, as follows: "No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this Act, * * *."

The plaintiff takes the position that the foregoing is inapplicable where the injury does not fit a category specified by section 8(e). But this ignores the fact that he is still an employee "who is covered by the provisions of this Act," and more, the injury is admittedly compensable under other of its provisions.

Actually, it is difficult to see that any defense could exist to a claim for compensation under section 8(e) as well. Since the amendatory act of 1951, the section is not limited to the loss of both testicles, but covers also their permanent and complete loss of use. Even prior to this amendment,

this court held that the act did not require "physical severance of the testicles" but included loss "in the more serious sense that they never again could perform their normal function having to do with sexual intercourse and the propagation of offspring." (*Northwestern Barb Wire Co.* v. *Industrial Com.*, 353 Ill. 371.) This is precisely the injury which the plaintiff claims here. And that the Industrial Commission regards such an injury compensable as a loss of use of both testicles is indicated by its award in *Anderson Shumaker Co.* v. *Industrial Com.* No. 33564, in which we denied a writ of error at the March, 1955, term. In that case, as here, the injury consisted primarily of a ruptured urethra. See Gray, Attorney's Textbook of Medicine, vol. 3, sec. 301.07.

Yet even if it be assumed that the injury is not under section 8(e), it does not follow that the plaintiff should prevail. He still is covered by the act and sustained an accidental injury for which he received compensation benefits. Therefore, by its clear import section 5(a) bars his suit.

This is consistent with the legislative purpose of the statute. "The act was designed as a substitute for previous rights of action of employees against employers and to cover the whole ground of the liabilities of the master, and it has been so regarded by all courts. * * * It is therefore clear that the words 'accident' and 'accidental injuries' used in the act, were meant to include every injury suffered in the course of employment for which there was an existing right of action at the time the act was passed; also to extend the liability of the employer to make compensation for injuries for which he was not previously liable and to limit such compensation. The act, in taking away existing rights of action of the employee and extending the liabilities of the employer, fixes limits to the amount to be recovered, and is sustained as a legitimate exercise of the police power for the promotion of the general welfare by covering the entire subject with fixed rules." *Matthiessen & Hegeler Zinc Co.* v. *Industrial Board*, 284 Ill. 378, 382-3.

The general view regarding the particular problem before us here is expressed as follows by a leading writer in this field: "The compensation remedy is exclusive of all other remedies for the same injury, if the injury falls within the coverage formula of the act. If it does not, as in the case where occupational diseases are deemed omitted because not within the concept of accidental injury, the compensation act does not disturb any existing remedy. However, if the injury itself comes within the coverage formula, common-law action is barred even though the particular element of damage is not compensated for, as in the case of disfigurement in some states, impotency, or pain and suffering." (Larson, Workmen's Compensation Law, sec. 65.00.) At section 65.10 of the cited text the author states a reason for the compensation act affording the exclusive remedy: "This is part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts."

The plaintiff refers to decisions of other jurisdictions involving noncompensable occupational diseases or injuries for which no compensation was provided by statute. They are not analogous to the instant case. Apart from statutory and factual differences, the employees did not qualify for benefits under the applicable statutes. The courts were not called upon, as is this court, to permit a recovery under the Workmen's Compensation Act and then permit also a suit at common law against the same person, to recover additional damages said to arise out of and be connected with the same accidental injury constituting the basis for the one cause of action. See *Hyett* v. *Northwestern Hospital*, 147 Minn. 413.

Having determined that the statute is applicable, we next consider its constitutionality as against asserted violations of due process (Ill. Const., art II, sec. 2; U. S. Const., 14th amend.) and other provisions of the Illinois constitution.

By the Workmen's Compensation Act, the legislature required the employer to give up certain defenses and required the employee to give up certain recoverable elements of damage of a common-law negligence action; and this we have held many times is a reasonable exercise of the legislature's police power for the promotion of the general welfare. (See, for example, *Grand Trunk Western Railway Co.* v. *Industrial Com.* 291 Ill. 167; *Matthiessen & Hegeler Zinc Co.* v. *Industrial Board*, 284 Ill. 378.) This court has never considered one to have such a vested right in the common-law rules governing negligence actions as to preclude the legislature from substituting a statutory remedy of this type for the common-law remedy.

For the reasons stated, the judgment of the circuit court of Peoria County is affirmed.

Judgment affirmed.

Mr. Justice Bristow, dissenting:

FILED
MAY 25 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1956

NO. 892

RAYMOND MOUSHON,
Plaintiff-appellant,

vs.

NATIONAL GARAGES, INC.,
Defendant-appellee.

Appeal From The Supreme Court of Illinois

APPELLANT'S REPLY TO MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

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REPLY TO MOTION TO DISMISS OR AFFIRM

The appendix to appellee's motion contains the majority opinion of the Illinois court but does not contain the dissenting opinion or the first opinion. These can be found in the appendix to the Jurisdictional Statement.

Appellee's Motion to Dismiss presents two arguments which are as follows:

1. Appellant does have a remedy under the Illinois law for the permanent effects of his injury, and

2. Appellant does not have a remedy under the Illinois law for the permanent effects of his injury but the act is nevertheless constitutional when applied to the facts in this case.

I

To support the first argument appellee contends the court should go outside the record of this case and consider a claim which is pending before an administrative body which is not part of the record in this case. As a basis for denying jurisdiction in this case appellee cites its own opinion as to the final outcome of that proceedings. On page 7 of the Motion appellee states plaintiff should pursue his remedy before the Industrial Commission "where his chances for success are excellent, and where any award would be sustained on appeal to the court." Similar predictions appear on pages 5, 8 and 11. The surprising feature in appellee's argument is that after citing its own predictions of the outcome of another proceedings as a reason why this court should not take jurisdiction of this case it accuses the appellant on page 6 of the Motion of asking this court to decide a hypothetical question.

One need only refer to the record in this case to see that appellant does not claim loss of use of testicles in his complaint but instead alleges he has sustained a ruptured urethra and other internal injuries which have rendered him impotent. The Illinois Compensation Act does not authorize the Commission to make an award for this injury and to say that if he could prove he sustained an injury of another type he could recover merely avoids the issue presented in this case.

A reading of the opinion clearly indicates the Illinois court did not decide the case on the basis that appellant's remedy was under the compensation act for loss of use of testicles. This was not the issue presented by the pleadings nor was it the issue which the trial court decided. The pleadings are brief and concise. After the appellant filed his complaint alleging his nondisabling injury the

appellee filed its motion to dismiss the suit and cited the section of the compensation act which bars the filing of common law suits as the *only* grounds for dismissal. Appellant then filed his motion to strike the appellee's motion and alleged that if the appellee's motion were allowed and the suit dismissed the appellant's rights under the 14th Amendment would be violated. The trial court allowed the appellee's motion and denied the appellant's motion and dismissed the suit. The Illinois Supreme Court affirmed this ruling. The issue thus formed by the pleadings is whether the act is constitutional in depriving appellant of his common law remedy even though it makes no provision for compensating him for the permanent effects of his injury. The court in its discussion of syllabi 2, 3 and 4 definitely ruled that the act was a bar to appellant's common law suit and that the act in so barring his right to file a common law suit did not violate his rights under the 14th Amendment*.

II.

Appellee's second argument pertains to the issue which was in fact decided by the Illinois Court. Appellee's argument states in effect that if the Illinois Compensation Act provides medical and temporary disability benefits it does not violate the 14th Amendment even though it

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* Footnote 1 page 3 of appellee's Motion states that appellant based his argument on a syllabus to the Illinois Court's decision. The only references in the Jurisdictional Statement to syllabi are on page 14 (in two places) and on page 19. In all three instances appellant did not refer to the syllabus itself but instead to the court's discussion of these enumerated portions of its opinion. We submit that appellee's accusation that appellant made an inaccurate "characterization" of the syllabi is without justification.

does not provide for compensation for the permanent effects of appellant's injuries and even though it takes away his right to sue at common law for the permanent effect of his injuries.

The act as construed by the court's opinion classifies injured employees as follows:

(1) Where the injury is one of those specifically enumerated or is totally or partially disabling then the permanent nature of the injury is a factor in determining the amount of compensation.

(2) Where the injury is not one of those specifically enumerated or does not totally or partially impair working ability then the permanent nature of the injury is not considered in determining the amount of compensation.

This is the classification which appellant contends violates his rights under the 14th Amendment when the act is applied to the facts in this case.

At common law all employees were entitled to sue for the permanent effects of their injuries. Under the Illinois Act only those who have received injuries of a certain type can recover for the permanent effects of their injuries while other employees are deprived of that right.

There is nothing inherent in the problem which the act is designed to remedy which requires the foregoing classification in order to make such legislation possible. Appellee's Motion fails to cite any legal, social or economic basis for depriving appellant of his remedy to recover for the permanent effects of his injury and offers no explanation as to why it is necessary that appellant be deprived of his right in order to provide additional benefits for other injured employees.

Appellee argues on page 9 of its Motion that this is merely a change in the form of the remedy. The act does more than change the form of the remedy; it deprives the appellant of a substantive right he had at common law. It is obvious that he has been deprived of a right but the question is, Has he been deprived of this right without due process of law or does the statute deny him the equal protection of the law?

The philosophy behind appellee's argument is that legislation which deprives a small class of employees of their right to recover for the permanent effects of their injuries caused by their employer's negligence is justified because it permits a larger class to recover benefits for the permanent effects of their injuries without proving the injuries were caused by another's wrong and may in fact have been caused by their own negligence. To say that those who have been wronged, must suffer in order that those who have not been wronged, may benefit makes legislative martyrs of the innocent for the benefit of the guilty. Such a doctrine presents a substantial question under the "due process" and "equal protection" clauses of the 14th Amendment which is worthy of the consideration of this court.

Appellant respectfully submits that appellee's Motion to Dismiss or Affirm should be denied.

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No. 892. MOUSHON *v.* NATIONAL GARAGES, INC. Appeal from the Supreme Court of Illinois. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Robert G. Day* for appellant. *Thomas C. Angerstein, Sidney Z. Karasik, Paul R. Connolly* and *Charles T. Shanner* for appellee. Reported below: 9 Ill. 2d 407, 137 N. E. 2d 842.